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IN THE

Supreme Court of the United States

October Term, 1967

No. 352

DISTRICT LODGE NO. 15 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, AND PENN CORK & CLOSURES, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STEPHEN C. VLADECK,
Attorney for Petitioners,
165 West 46th Street,
New York, N. Y. 10036.

JUDITH P. VLADECK,
BERNARD YAKER,
Of Counsel.

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No. _____

DISTRICT LODGE NO. 15 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, AND PENN CORK & CLOSURES, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

District Lodge No. 15 of the International Association of Machinists, AFL-CIO, and Penn Cork & Closures, Inc.,[1] respectfully pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit entered on April 26, 1967 (R. 51)[2] which

[1] The Petitioner, Penn Cork & Closures, Inc., has authorized the statement that it joins in the petition of District Lodge No. 15 of the International Association of Machinists, AFL-CIO.

[2] "R" numbers in parentheses refer to pages in Record certified by the Clerk of the Court of Appeals of the Second Circuit. The record includes the Appendix to the brief of the National Labor Relations Board in the Court of Appeals, pages 1-30. Nine additional copies of the Appendix are being filed herewith.

granted a petition to enforce an order of the National Labor Relations Board dated December 28, 1965 (R 1-11).

Opinions Below

The opinion of the Court of Appeals (R 42-50) is reported officially at 376 F. 2d 52, and unofficially at 64 LRRM 2855, and is printed in Appendix A, *infra*, pp. 13-20. The National Labor Relations Board's findings of fact, conclusions of law, and order (R 1-11) are reported officially at 156 NLRB 411, and unofficially at 61 LRRM 1037.

Jurisdiction

The decree of the Court of Appeals was entered on April 26, 1967, and is printed in Appendix B, *infra*, pp. 21-22. The jurisdiction of this Court rests on 28 U. S. C. Sec. 1254 (1). The jurisdiction of the Court of Appeals rests on 29 U. S. C. Sec. 160(e).

Statutes Involved

The relevant portions of the National Labor Relations Act and the Labor Management Relations Act (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Sec. 141, *et seq.*), are printed in Appendix C, *infra*, pp. 23-26.[3]

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[3] The National Labor Relations Act was amended by the Labor Management Relations Act of 1947, known as the Taft-Hartley Act, in which Section 302(c)(4) appeared for the first time. Both Acts are hereinafter referred to collectively as the "Act". In 1951 Congress amended the Act further by eliminating from Section 9(e) the union shop authorization election.

Questions Presented

The National Labor Relations Board has ruled in this case that an employer violated Sections 8(a)(1) and 8(a)(2) of the Act by continuing to deduct union dues from employees' wages in accordance with lawful check-off authorizations following revocation of the union shop provision of the collective bargaining agreement and a request by the employees that the employer cease such check-off.

This determination as enforced by the Court of Appeals, raises the following question:

Is the rule created by the National Labor Relations Board permitting individual employees to revoke prematurely valid dues check-off authorizations following a union shop deauthorization election, consistent with the Act?

Implicit in this limited statement of the issue are the equally important questions:

1. May the Board, by the creation of an irrebutable presumption of coercion, engraft conditions onto Section 302(c) (4) of the Act, which section, as enacted by Congress, is the only section which prescribes the form of lawful dues check-off authorizations?

2. May the Board, by encouraging the repudiation by individual employees of obligations assumed in conformity with the Act, subordinate the majority-rule concept upon which Federal labor policy is based to the exercise of individual preference?

Statement

District No. 15, International Association of Machinists, AFL-CIO, one of the Petitioners, (hereinafter the "Union") was a party to a collective bargaining agree-

ment with Penn Cork & Closures, Inc. (hereinafter the "Employer") and represented all employees in the bargaining unit including those who sought to revoke their check-off authorizations. The Union was permitted to intervene in the proceedings before the Board and was granted leave to intervene on the petition for enforcement by order of the Court of Appeals dated October 31, 1966 (R 40).

The facts are not in dispute. In October and November 1964, some bargaining unit employees executed check-off authorizations authorizing the Employer to deduct from their wages each month the sum of $5.00 as Union membership dues (R 24). By its terms, each check-off authorization was irrevocable for one year, or up to the termination date of the current collective bargaining agreement, whichever occurred sooner (R 24-25). Thereafter it was revocable only by notice in writing given during a 15-day period following any irrevocable period:—that is, the 15 days after the passage of any year following the anniversary date of the agreement or the termination of the agreement, whichever occurred sooner. The check-offs were in the form specified in the collective bargaining agreement and permissible under Section 302 (c) (4) of the Act.

At the time the check-off authorizations were signed, the collective bargaining agreement contained a union-security provision which required membership in the Union after 90 days of employment as a condition of continued employment, and the Employer agreed to discharge any dues-delinquent employee within three working days after receipt of notice from the Union (R 22-23). The Employer also agreed to deduct dues and remit them to the Union in accordance with authorization cards signed by employees (R 23). That agreement expired by its terms on December 31, 1964. On December 30th, 1964, the Employer and the Union entered into a new agreement containing

identical union-security and check-off provisions. The agreement was for a term commencing January 1, 1965 and continuing in effect to December 31, 1967 (R 25).

On January 5, 1965, several employees filed a petition with the Board, pursuant to Section 9(e) of the Act seeking to withdraw the authority of the Union to enforce the requirement of Union membership as a condition of employment (R 14-15). An election was held on January 29, 1965, at which a majority of the employees cast their ballots in favor of de-authorization, and on February 8, 1965 the Board issued a certification to that effect (R 25).

On February 25, 1965 a petition was delivered to the Employer and the Union signed by 57 employees, stating that they resigned from the Union as of that date, and asserting that "no dues shall be deducted from our wages" (R 25-26). The Employer continued to deduct dues in accordance with the check-off authorizations previously signed by the employees and to hold the dues in a special fund (R 27-28).

The Employer did not deduct dues from the wages of the 19 employees who had not signed check-off authorizations (R 27).

Upon a charge filed by an employee, the Board found the Employer in violation of Sections 8(a)(1) and 8(a)(2) of the Act. The Board issued an order (R 1-11) for which enforcement was granted by the Court below; it is that decree of enforcement from which Petitioners seek to appeal.

Reasons for Granting the Writ

This is a case of first impression (R 50). The questions presented are of vital significance in the application of federal labor policy. Since the Board's order appears to be a major departure from the statutory language and

history, it should be passed upon by this Court so as to provide for predictability, and if Petitioners are correct, to prevent erosion of the Congressional intent by the Board's construction of the Act.

Petitioners contend that the Board's ruling that, "when there has been an affirmative deauthorization vote, outstanding check-off authorizations originally executed while a union security provision is in effect become vulnerable to revocation regardless of their terms," (R 6) has no statutory foundation or authority and is inconsistent with the pattern intended by Congress in the enactment of the basic labor legislation.

Indeed, in direct conflict with the express purpose of the law [Section 1(b), 29 U. S. C. Sec. 141(b)] and the Board's own prior decisions,[4] the order enforced by the Court below denies to labor organizations their statutory right to collect dues to enable them to represent employees as their duty dictates and as the law requires. Essential to an understanding of the conflict is recognition that the law requires that the union continue as bargaining agent for all employees in the unit despite a union security deauthorization election. The effect of the Board's decision would be the unwarranted weakening of unions and an unlawful interference with legitimate collective bargaining relationships.

In addition, the Board's decision ignored the basic intent of Congress by making dues check-offs under these circumstances an unfair labor practice although the Act expressly declares such check-offs valid. By amending the Act through an administrative device, the Board exceeded its power.

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[4] By the Board's own pronouncement [*Great Atlantic & Pacific Tea Company, Inc.*, 100 NLRB 1494 (1952); *Andor Co.*, 119 NLRB 925 (1957); *Monsanto Chemical Co.*, 147 NLRB 49 (1964)], all terms of a collective bargaining agreement other than the union security provision remain intact following deauthorization under Section 9(e)(1).

Moreover, the Board's finding, based upon a presumption of coercion arising from the simultaneous existence of a dues check-off provision and a union shop provision in the contract, was in direct conflict with decisions of this Court prohibiting unfair labor practice findings based upon mere inferences. Such a presumption also ignored two fundamental principles; dues check-off authorizations are purely voluntary, indeed must be so in order to be valid,[5] and union shops are expressly declared by the Act to be lawful.

Finally, the order is a rejection of the statutory scheme which is one of subordination of individual employees' wishes to the concept of majority rule. [*NLRB* v. *Allis-Chalmers*, —— U. S. —— (decided June 12, 1967) 35 L. W. 4623]. The Board has accepted the principle of majority rule in acknowledging that the bargaining representative has almost unlimited authority in deciding in good faith whether or not to press claims on behalf of individual employees against an employer and in arriving at contract terms affecting individual employees.

Nevertheless, when faced with a complaint which, reduced to its essence, is one of the obligation of a member to his collective bargaining representative, it appears to reject majority rule and resists requiring an employee to do something he would rather not do. It disregards all of the statutory provisions, and invents an escape for a reluctant debtor because he is an employee at odds with his union. Such concern for the worker is not only misplaced but destructive of the very root of employee security—the strong and economically sound union which can achieve the industrial harmony the labor law was intended to encourage.

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[5] 19 employees here never signed check-off authorizations despite the union shop provision.

Conflict With the Statutory Purpose and the Applicable Decisions of This Court

The Court of Appeals, in enforcing the Board's order, mistakenly assumed that the Board would have reached the same result had it used its rule-making authority under Section 6 of the Act (29 U. S. C. Sec. 156). On the contrary, in a rule making proceeding the Board would have been compelled to analyze the legislative history for guidance and for an understanding of the Act's purpose and Congress' intent. *United States* v. *American Trucking Association, Inc.*, 310 U. S. 534 (1940). If then, the Board promulgated a rule out of harmony with the statute, such a rule would have been declared a nullity. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 397 U. S. 129 (1936); *General Engineering, Inc.* v. *NLRB*, 341 F. 2d 367 (9th Cir., 1965).

The legislative history of Section 302(c)(4) of the Act, the only relevant statutory pronouncement on the question of check-off, clearly demonstrates how far the Board strayed from Congressional intent.[6] Senator Taft was the primary spokesman for the measure in the Senate. He viewed check-off without the consent of the employee as improper, and accordingly Section 302(c)(4) prohibited *automatic* check-off, but permitted check-off upon a voluntary written assignment.[7]

Nothing in the Senate debate on the amendment suggests that Senator Taft ever subscribed to the notion that check-

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[6] For the background of the Labor-Management Relations Act of 1947 (Taft-Hartley), see Millis-Brown, *From the Wagner Act to Taft-Hartley*, University of Chicago Press, 1950, Ch. 9.

[7] 2 Leg. Hist. 1310-1311 (References to Leg. Hist. are to Legislative History of the *Labor-Management Relations Act*, 1947, U. S. Government Printing Office, 1948).

off was a form of improper union security or anything but a device which he believed should be permissible only if agreed to voluntarily. Certainly the debate reveals no legislative acceptance of the idea that illegal check-off should be dealt with by creating a new employer unfair labor practice in Section 8 of the Act as the Board did here. The history is wholly to the contrary since the statute imposes only criminal sanction for illegal check-off and did not incorporate a House proposal to use the sanction of unfair labor practice charges (H. R. 3020 [the Hartley Bill]).[8]

In its efforts to remedy what it may have felt to be legislative error the Board appears to have deliberately confused the provisions of Section 302(c)(4) and the unfair labor practices described generally in Section 8. Relying upon Section 8(a)(3),* and Section 9(e)(1) the Board created an entirely new unfair labor practice not provided for in the statute, that is, the check-off of monies pursuant to check-off authorizations, lawful under Section 302(c)(4), following a deauthorization election in which only the union shop is voided. Certainly, there is no question that the legislative history of the Taft-Hartley Act is permeated with the intent of Congress to outlaw "compulsory" unionism, an issue not here involved. The act specifically banned the closed shop and required a vote of the majority of employees in a secret election to authorize a lawful union shop provision. The 1951 amendment to the Act which eliminated the wasteful authorization election and retained the deauthorization election, was not the result of any changed legislative intent.[9]

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* The Employer in this case was charged only with violation of Sections 8(a)(1) and 8(a)(2)—not Section 8(a)(3).

[8] 1 Leg. Hist. 177-178.

[9] *Millis-Brown, supra,* ft. 6, p. 436.

The Board, apparently dissatisfied with the statute as it was written, sought by administrative device to legislate. It established a broader, more pervasive scheme of regulation than Congress intended, and, in so doing, exceeded its authority. *Local 357, Teamsters* v. *NLRB*, 365 U. S. 667 (1961).

Conflict With the Statutory Language

Apart from the legislative history, the plain meaning of the language of the Act should have prevented the enforcement of the Board's order. Section 302(c)(4), in clear and unambiguous terms, establishes precise standards for a valid check-off authorization and Section 302(d) provides that criminal penalties shall apply in the event of a willful violation of that provision. Enforcement is the responsibility of the Department of Justice.

Section 8(a)(3) makes it an unfair labor practice for an employer to encourage or discourage membership in any labor organization but permits an employer and a union to enter into a valid union shop agreement as was done here. Violation of Section 8(a)(3) is an unfair labor practice; the remedies for the commission of unfair labor practices are wholly within the power of the National Labor Relations Board. Neither Section 8(a)(3) nor Section 302(c)(4) are so vague, so obscure, or so broad as to permit the interpretations adopted by the Board and accepted by the Court below.

The Invalid Presumption of Coercion

Despite the Board's assumption of interrelationship there is no necessary connection between union security and dues check-off provisions in a collective bargaining

agreement.[10] This distinction has been consistently recognized by the Board in the past.[11]

For the Board to have presumed coercion solely from the simultaneous existence of check-off authorizations and a valid union shop was an attempt to resurrect the *Brown-Olds* [12] remedy rejected by this Court in *Local 60, Carpenters* v. *NLRB*, 365 U. S. 651 (1961). In refusing to accept the Board's presumption that a check-off provision coupled with an invalid union security provision is coercion *per se*, this Court held that the Board lacked the power to order reimbursement of dues in the absence of specific evidence that union membership was induced by means violative of the Act. See also *Hooker Chemical Corp.*, 128 NLRB 1394 (1960); *Chun King Sales, Inc.*, 126 NLRB 851 (1960).

The Board's tortuous presumption of coercion is certainly contrary to these decisions and baseless where, as here, there was no allegation or finding of fact that the

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[10] The collective bargaining agreement between the Union and the Employer in this case contained an article entitled "Union Shop" and a separate article entitled "Check-Off" (R 23). Many examples of contracts containing union shop provisions without provision for check-off can be cited, e.g., Retail Clerks International Association contracts with supermarkets, and building trades contracts with many of the unions in the industry. Equally there are many areas where check-off exists without union security provisions, e.g., New York State Civil Service System; New York City Board of Estimate Resolution Cal. #127, Jan. 12, 1956; U. S. Department of Defense Agreements.

[11] See, e.g., *International Harvester Co.*, 95 NLRB 730 (1951); *William Wolf Bakery*, 122 NLRB 630 (1958). See also *Valencia Baxt. Express, Inc.* (Case No. 24-UD-21, 49 LRRM 1446 (1962) (not officially reported), where it was held that a showing of interest to revoke a check-off is not a sufficient showing of interest to rescind a union shop under Section 9(e)(1).

[12] *Brown-Olds Plumbing & Heating Corp.*, 115 NLRB 594 (1956).

dues check-off authorizations were coerced or extorted by the threat of loss of employment. Indeed, to presume the contrary would have been more accurate (R 23, 27).

In effect, the Board has subordinated the interests and rights of the union—the certified collective bargaining representative—and given preferred status to the wish of an employee to breach his legal obligation. The confusion created by this change in Board approach has been compounded by more recent decisions which appear to hold that the existence of a union security provision is not the basis for a presumption of coercion.[13] Apparently then the presumption arises when a worker's wish to repudiate prematurely his valid check-off authorization following a deauthorization election is not given effect by the Employer in preference to the requirements of the collective bargaining agreement.[14]

Conclusion

The Board's order represents a sharp departure from the intent and purpose of the Act, and a misconstruction of its provisions.

For all of the reasons stated, it is respectfully urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

STEPHEN C. VLADECK,
Attorney for Petitioners,
165 West 46th Street,
New York, N. Y. 10036.

JUDITH P. VLADECK,
BERNARD YAKER,
Of Counsel.

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[13] *Bedford Can Mfg. Corp.*, 162 NLRB No. 133 (1967).

[14] *W. P. Ihrie & Sons*, 165 NLRB No. 2 (1967).

APPENDIX A

Opinion of Court of Appeals—Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Before:

MOORE and FRIENDLY, *Circuit Judges*, and
BRYAN, *District Judge.**

FRIENDLY, *Circuit Judge*:

This petition for enforcement raises an interesting question of law as to the power of the NLRB, see 156 N. L. R. B. 411 (1965). The facts were stipulated: On January 18, 1962, Penn Cork & Closures, Inc. entered into a collective bargaining agreement with District Lodge No. 15 of the International Association of Machinists with respect to its maintenance and production employees, effective from January 1, 1962 to December 31, 1964. Article II of the agreement was a union security clause complying with §8(a)(3) of the National Labor Relations Act; the company agreed therein that within three working days after receipt of notice from the union it would discharge any employee who was not a member in good standing. Article III provided for checkoff of initiation fees and dues of employees who authorized the deduction; any such authorization was to be irrevocable for a year or until the termination date of the agreement, whichever sooner occurred, and thereafter for yearly periods unless revoked within ten days following the

* Of the Southern District District of New York, sitting by designation.

date when its irrevocability ceased. Many employees signed authorizations conforming to the agreement save that the period for revocation was fifteen rather than ten days after the end of any irrevocable period. On December 30, 1964, the company and the union entered into a similar collective bargaining contract effective from January 1, 1965 until December 31, 1967. On January 5, 1965, employees petitioned the Board pursuant to §9(e)(1) of the Act[1] for an election to determine whether the union security provisions of the agreement should be rescinded. The election was held on January 29, a majority so voted, and the Regional Director issued a certification on February 8. Later that month 57 employees delivered to the company and the union a signed statement that they had resigned from the union and that "no dues shall be deducted from our wages." The company declined to comply, except as to 19 employees for whom no checkoff had ever been made since they had not signed authorizations, on the ground that it remained bound by the checkoff clause in the contract; it agreed, however, to keep the withheld dues in a special fund pending judicial determination. After appropriate charge, complaint, stipulation of the facts, and waiver of a trial examiner's decision, the Board concluded that in continuing the checkoff as to these employees the company had violated §8(a)(1) by interfering with their §7 right to refrain from joining or assisting labor organizations, and §8(a)(2) by rendering unlawful assistance and financial support to a labor organi-

[1] This provides:

> (e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

zation; it directed the company to refund the dues of employees who had revoked their authorizations and to refrain from withholding them in the future. When the Board sought enforcement, the employer took no position, leaving opposition in the capable hands of counsel for the union, which has been allowed to intervene.

The Taft-Hartley Act as initially enacted prohibited execution of a union security agreement unless a majority of the employees had approved it in a Board-conducted election, 61 Stat. 136, 141, 144-45 (1947). In administering this provision the Board was called upon to conduct thousands of elections, almost all of which were won by the union. 14 NLRB Ann. Rep. 6 (1949). To eliminate this burden, Congress in 1951 provided that union security agreements could be executed without prior employee authorization, and to continue "to safeguard employees against subjection to union-shop agreements which a majority disapproves," 2 U. S. Code Cong. & Adm. News 2381 (1951), reprinting S. Rep. No. 646 (82d Cong. 1st Sess.), relied on the requirement, also contained in the 1947 Act, that the Board must conduct an election with respect to rescission of the union security clause when 30% of the employees requested, 65 Stat. 601-02 (1951).

The Board asserts that where a union shop exists under the authority of §8(a)(3), it is logical to infer that employees authorizing dues checkoffs do so under its influence. This inference is particularly compelling where, as here, the collective bargaining agreement obliges the company to dismiss a worker within three days of being notified by the union of his failure to maintain his good standing; under such an agreement an employee is likely to authorize a dues checkoff for fear that without it he may forget to make the payments and risk dismissal for failure to pay

union dues. The Board argues that, once a §9(e)(1) election has rescinded a union security clause, permitting an employer to continue to check off dues despite prompt resignations and dues-assignment revocations would undermine the freedom of election that Congress intended under §9(e)(1), since rescission of the union security clause would be of little benefit if it did not provide relief from continued payment of union dues, very likely the principal reason workers would seek rescission.

The union argues that Congress could not have intended such a result. Its first reliance is upon §302 which, after making it unlawful for an employer to pay money to a representative of employees, §302(a), says in subdivision (c) that this general condemnation shall not apply to various cases, one of which is

> "(4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than a year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner."

The union contends that the Board is without authority to brand as an unfair labor practice any checkoff arrangement not illegal under §302. The conclusion does not follow. Congress' determination that only certain checkoff arrangements should give rise to criminal penalties, §302(d), or be enjoinable, §302(e), did not immunize all others from scrutiny under §8 by the agency given responsibility for carrying out the declaration of policy in §1.

The union is on stronger ground, although not strong enough, in its alternative argument that the Board had no sufficient basis for concluding that an employer violates §§8(a)(1) or (2) by continuing to honor checkoff authorizations which were prematurely revoked under the circumstances here presented. It stresses that many union security agreements do not have checkoff provisions and, more to the point, that there may be checkoff agreements without union security clauses. Since it would be hard to see how continued enforcement of the checkoff after purported revocation would be an unfair labor practice in the latter example, the union asks how this case differs; it complains also that it is left with the burden of administering the agreement without the sinews on which it had counted. But this argument too must fail. Here there is a union shop agreement which can be said to have influenced the workers' decisions to authorize dues checkoffs, whereas in the union's hypothetical there is no such union shop agreement that could have influenced those decisions. The contention that the union assumed its duties as collective bargaining agent solely in reliance on its being able to compel dues from all employees does not impress us. For one thing, the union has cited nothing to show it could not lay down its burden if it wished. For another, it was established long before execution of the instant agreement that only if a deauthorization vote pursuant to §9(e)(1) "immediately relieves employees of the obligations imposed by an existing union-security agreement can this [Labor] Board give effect to the basic congressional objective," *Great Atlantic & Pacific Tea Co.*, 100 N. L. R. B. 1494, 1497 (1952); see also *Andor Co.*, 119 N. L. R. B. 925 (1957); *Monsanto Chemical Co.*, 147 N. L. R. B. 49 (1964); for the Board to view checkoffs authorized during the term of a union security agreement as being made under the influence of that agreement and therefore an "obligation imposed"

by that agreement revocable after a §9(e)(1) election is but a slight extension of this established doctrine and could not have come as a great surprise. As to the unfairness of leaving the union to discharge the duties of a collective bargaining representative without the sustenance of compelled dues, the 1947 Act prior to its amendment in 1951 required all unions to perform their collective bargaining functions without compelled dues until a majority in the bargaining unit, in a Board-conducted election, authorized a union security arrangement; there is no evidence that when Congress eased this requirement on the precise basis that the deauthorization election gave disenchanted employees the necessary protection, it meant to allow the union to compel the payment of dues thereafter. The Board acted within the broad authority committed to it in the area of labor-management relations as the "tribunal appointed by law and informed by experience," *Illinois Central R.R.* v. *ICC*, 206 U. S. 441, 454 (1907), in concluding that Congress intended the 1951 amendment to effect a procedural but not a substantive change [2] and that rescission of the union security clause as a result of a §9(e)(1) election should also work a rescission of checkoffs authorized by employees because of the union security provisions.[3]

If employees had testified that they had authorized the checkoffs because of the union security agreement, there could scarcely be doubt of the Board's power to hold that rescission of the union security clause should release them

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[2] The Board has said this before. See, e.g., *Great Atlantic & Pacific Tea Co.*, 100 N. L. R. B. 1494, 1495-97 (1952).

[3] On the facts here, where the request for a deauthorization election came only six days after the new union security agreement, it is quite clear that the latter would have failed of the approval required by the Taft-Hartley Act as enacted.

from their authorizations. But even without such testimony the Board could draw on its general knowledge to conclude that a union security clause would be the procuring cause of checkoff authorizations for a substantial number of employees and could proceed from that to a decision that effective administration of the Act required a general rule, couched if need be in terms of a presumption, which would be available to all employees alike and would avoid the impossible administrative task of exploring the mental processes of thousands of workers. See *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793, 800 (1945); *Radio Officers' Union* v. *NLRB*, 347 U. S. 17, 45-46 (1954).

We do not read *Local 60, United Bhd. of Carpenters* v. *NLRB*, 365 U. S. 651 (1961), heavily relied on by the union, as withdrawing from the Board the authority, so important for an administrative agency, thus to fill gaps in the necessarily rather general legislation enacted by Congress. That decision, which condemned the Board's drastic "Brown-Olds" remedy whereby a union or employer violating the closed-shop provisions of the Taft-Hartley Act would be obliged to reimburse all employees for union dues or initiation fees retroactively to six months before the filing of the charge, see *J. S. Brown-E. F. Olds Plumbing & Heating Corp.*, 115 NLRB 594 (1956), rested on the lack of any basis for inference that "even a single person joined the union with the view of obtaining work on this project" or that "any who had voluntarily joined the union was kept from resigning for fear of retaliatory measures against him." 365 U. S. at 651. Furthermore, the Board's practice had been to refuse evidence that some employees voluntarily paid the dues which the *Brown-Olds* remedy would return to them as obtained by coercion. 365 U. S. at 657 (Harlan, *J.*, concurring). Here, however, we know that a considerable number of employees resigned from the union and revoked checkoff authorizations as soon as the

compulsion of the union security clause was removed by the election for which Congress provided, although they had failed to exercise their revocation rights only six weeks before when the authorizations were revocable according to their terms but the union security clause was still in effect.

It would indeed have been far better if the Board had conducted a rule-making proceeding under §4 of the APA and, on suitable development of the facts, had formulated a rule so that employees would have known from the outset of the freedom here recognized and unions would have been aware of the attendant risks. Regrettable as is the Board's continued failure to use its rule-making powers, see *SEC* v. *Chenery Corp.*, 332 U. S. 194, 202 (1947); *NLRB* v. *A. P. W. Products Co.*, 316 F. 2d 899, 905-06 (2 Cir. 1963); Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L. J. 729 (1961); 1 Davis, Administrative Law Treatise, §6.13 (1965 pocket part), we cannot say that, on the facts of this case where, as in *Chenery Corp.* v. *SEC, supra,* the agency was dealing with an issue of first impression, its choice to proceed by the adjudicative route was beyond its power.

Enforcement granted.

APPENDIX B

Decree Appealed From (Court of Appeals—Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 30,820

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

PENN CORK & CLOSURES, INC.,

Respondent.

DECREE

Before:

Moore and Friendly, Circuit Judges, and
Bryan, District Judge.*

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, its officers, agents, successors, and assigns on December 28, 1965. The Court heard argument of respective counsel on January 24, 1967, and has considered the briefs and transcript of record filed in this cause. On April 10, 1967, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

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* Of the Southern District of New York, sitting by designation.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Penn Cork & Closures, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

LEONARD P. MOORE
Judge, United States Court of Appeals for the Second Circuit

HENRY J. FRIENDLY
Judge, United States Court of Appeals for the Second Circuit

Filed: April 26, 1967.

A true copy.

R. DANIEL FUSARO
Clerk

APPENDIX C

Statutes Involved

The relevant provisions of the National Labor Relations Act and the Labor Management Relations Act (61 Stat. 136, 29 U. S. C. Sec. 141, et seq.) are as follows:

Section 1(b) [29 U. S. C. Sec. 141(b)]

(b) Industrial strife which interferes with the normal flow of commerce, and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Section 6 [29 U. S. C. Sec. 156]

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the

Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

Section 8(a)(1-3) [29 U. S. C. Sec. 158(a)(1-3)]

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the

employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 9(e)(1) [29 U. S. C. Sec. 159(e)(1)]

Upon the filing with the Board by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

Section 302 (c)(4) [29 U. S. C. Sec. 186(c)(4)]

(c) The provisions of this section shall not be applicable:

* * * (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; * * *

Section 302(d) [29 U. S. C. Sec. 186(d)]

Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.